TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~849~~ ~~86~~ 17

THE BANK OF AMERICA, PLAINTIFF IN ERROR,

vs.

VIRGINIA BANKS AND A. D. BANKS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED JANUARY 25, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 349.

THE BANK OF AMERICA, PLAINTIFF IN ERROR,

vs.

VIRGINIA BANKS AND A. D. BANKS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

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1 To George Swann, esqr., clerk of the circuit court of the United States for the southern district of Mississippi:

The undersigned, the Bank of America, feels aggrieved by a judgment rendered at the May term, 1874, of the circuit court of the United States for the southern district of Mississippi, in a certain cause wherein the Bank of America was plaintiff and Virginia Banks and Andrew D. Banks were defendants.

Wherefore said Bank of America, plaintiff aforesaid, prays that a writ of error may issue returnable to the next term of the Supreme Court of the United States to be held on the second Monday of October, A. D. 1875, at Washington, D. C., upon giving bond as required by law.

THE BANK OF AMERICA,
By PITTMAN & PITTMAN,
Att'ys of Record.

(Endorsed:) Filed in clerk's office June 4th, 1875. Geo. T. Swann, cl'k.

2 Supreme Court of the United States.

Know all men by these presents, that we, the Bank of America, a corporation under the laws of the State of Louisiana, domiciled in said State, in the city of New Orleans, and Jacob Shlenker, are held and firmly bound unto Virginia Banks and Andrew D. Banks in the sum of five hundred dollars to be paid to the said Virginia Banks and Andrew D. Banks, their executors or administrators; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 3rd day of June, A. D. 1875.

Whereas the above-named, the Bank of America, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the case wherein the said Bank of America were plaintiffs, and the said Virginia Banks and Andrew D. Banks were defendants, by the circuit court of the United States for the southern district of Mississippi; now, therefore, the condition of this obligation is such, that if the above-named, the Bank of America, shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void,
3 otherwise the same shall remain in full force and effect.

Sealed and delivered the day and year first above written.

BANK OF AMERICA, [SEAL.]
By W. B. PITTMAN. [SEAL.]
JACOB SHLENKER. [SEAL.]

Attest:
S. B. PITTMAN.

(Endorsed:)
Security sufficient and approved.
[SEAL.]
LAZ. LINDSEY,
U. S. Com'r.

I approve the foregoing bond.
R. A. HILL, *Judge.*

Filed June 19th, 1875.
GEO. T. SWANN,
Clerk.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the circuit court of the United States for the southern district of Mississippi, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Bank of America, plaintiff, and Virginia Banks and A. D. Banks, defendants, a manifest error hath happened, to the great damage of the said Bank of America, as by its complaint appears; we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may leave the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. M. R. Waite, Chief Justice of the said Supreme Court, the 4th day of June, A. D. 1875, and Geo. T. Swann, clerk of said circuit court for the southern district of Mississippi.

[SEAL.] GEO. T. SWANN, *Clerk.*

(Indorsed:) 1218. Writ of error. Filed in clerk's office June 4, 1875. Geo. T. Swann, cl'k.

5 UNITED STATES OF AMERICA, *ss:*

To Virginia Banks and Andrew D. Banks, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Mississippi, wherein the Bank of America is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Justice of the said Supreme Court of the United States, this 4th day of June, A. D. 1875.

R. A. HILL, *Judge.*

Service of this writ acknowledged this 4th day of June, A. D. 1875.

W. L. NUGENT,
Atto' for Banks & wife (Virginia Banks).

Teste as to signature of W. L. Miguel:
GEO. T. SWANN, *Cl'k.*

6 (Indorsed:) 1218. Bank of America vs. Virginia Banks and Andrew Banks. Citation. Filed in clerk's office June 4, 1875. Geo. T. Swann, cl'k.

7 BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS. } No. 1218.

Pleas and proceedings had and done in the circuit court of the United

States for the southern district of Mississippi, at a regular term thereof held at the court-room in the city of Jackson, on the 1st Monday, being the 3rd day of May, A. D. 1875, before the Hon. Robert A. Hill, district judge of the United States for the southern district of Mississippi, present and presiding.

Be it remembered that heretofore, to wit, on the 3rd day of April, A. D. 1871, the Bank of America, of New Orleans, Louisiana, a corporation created by and under the laws of the State of Louisiana, by Attorney W. B. Pittman, filed in the clerk's office of said court the following declaration and exhibits in words and figures following, to wit:

UNITED STATES OF AMERICA:

In circuit court of the United States for the southern district of Mississippi. To the May term thereof, A. D. 1871.

BANK OF AMERICA
vs.
A. D. BANKS & VIRGINIA BANKS.

8 The Bank of America of New Orleans, Louisiana, a corporation created by and under the laws of the State of Louisiana, by its president and cashier, plaintiff, complains of Virginia Banks and pro forma of her husband Andrew D. Banks, defendants, citizens of Mississippi, and residents of this district, for that whereas, to wit, on the 14th day of February, A. D. 1866, the said Virginia Banks, being then the owner of a plantation in Madison County, in the State of Mississippi, in her separate right, and of one in Warren County, Mississippi, and being in need of supplies for the cultivation of said plantations, applied to Denit & Lewis, commission merchants in the city of New Orleans, for money and supplies for the purpose of enabling her to cultivate said plantation, and entered into a contract with said Denit & Lewis, by and with the consent of her husband, to obtain said supplies for the use of her separate property, and did obtain supplies and money to the amount of six thousand dollars for said purpose from said Dennit & Lewis, and in payment for said supplies the said Virginia Banks did jointly with her husband make and execute their three several
9 promissory notes; the first of said notes for the sum of two thousand dollars, dated Feb. 14, 1866, payable to their own order on the first day of November, with interest at the rate of eight per cent. per annum after maturity until paid, signed Virginia Banks, A. D. Banks, and by them endorsed in blank. The second note of two thousand dollars, dated 14th of Feb., 1866, payable to their own order on the 1st day of December, A. D. 1866, with eight per cent. interest from maturity, signed and indorsed in blank by said Virginia Banks and Andrew D. Banks. The third note for the sum of two thousand dollars, dated Feb. 14th, 1866, payable to their own order on Jan'y 1st, 1867, with eight per cent. per annum from maturity, signed and endorsed in blank by said Virginia Banks and Andrew D. Banks; copies of which notes are herewith filed and made part of this declaration. And that the said Virginia Banks did deliver said notes so executed and endorsed to said Dennit & Lewis, and that the said Dennit & Lewis, before the maturity of said promissory notes, to wit, on the 1st day of Sept., 1866, sold said notes for a valuable consideration to the Bank of America

and assigned the same by delivering them to said Bank of
10 America, and that the said Virginia Banks became thereby indebted to the said Bank of America in the sum of six thousand dollars, and liable to pay the same out of her separate property, and being so indebted, did undertake and promise to pay said sum of money to said Bank of America according to the tenor and effect of said notes, but nevertheless, totally disregarding her promises in the premises, has not paid said sum of money nor any part thereof, to the damage of plaintiff in the sum of nine thousand dollars.

Wherefore plaintiff brings this suit, and prays judgment for the amount of plaintiff's debt and interest and costs against the separate property of M'r's Virginia Banks, defendant herein.

PITTMAN & FLOWEREE,
Att'ys for Plaintiff.

$2,000.00.] NEW ORLEANS, *Feb'y* 14, 1866.

On the first of December next we or either of us promise to pay to the order of ourselves, at the Louisiana National Bank in the city of New Orleans, two thousand dollars, for value received, with interest at the rate of 8 % per annum after maturity until paid.

(Signed) VIRGINIA BANKS.
ANDREW D. BANKS.

(Across the face:)

In conformity with an act acknowledged before me this 15th Feb'y, 1866.

WILLIAM SWANN,
Com'r of Miss.

(Endorsed:) Virginia Banks. Andrew D. Banks.

11 $2,000.00.] NEW ORLEANS, *Feb'y 14th*, 1866.

On the first day of January, 1867, we or either of us promise to pay to the order of ourselves, at the Louisiana National Bank, in the city of New Orleans, two thousand dollars, for value received, with interest at the rate of 8 % *per cent.* per annum after maturity until paid.

(Signed) VIRGINIA BANKS.
ANDREW D. BANKS.

(Across the face:)

In conformity with an act acknowledged before me this 15th of Feb'y, 1866.

WILLIAM SWANN,
Com'r of Miss.

(Endorsed:) Virginia Banks. Andrew D. Banks.

$2,000.00.] NEW ORLEANS, *Feb'y 14th*, 1866.

On the first of November next we or either of us promise to pay to the order of ourselves, at the Louisiana National Bank, in the city of New Orleans, two thousand dollars, for value received, with interest at the rate of 8 % per annum after maturity until paid.

(Signed) VIRGINIA BANKS.
ANDREW D. BANKS.

(Across the face:)

In conformity with an act acknowledged before me this 15th Feb'y, 1866.

WILLIAM SWANN,
Com'r of Miss.

(Endorsed:) Virginia Banks. Andrew D. Banks.

(Endorsed:) Filed with copy of notes (3) April 3d, 1871. G. T. Swann, clerk.

And afterwards, to wit, on the 24th day of April, A. D. 1871,
12 the following plea was filed in words and figures following, to wit:

Plea.

Circuit court, May term, 1871.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS.

1. And the said defendants by attorney come and defend, &c., and for plea in this behalf say that they did not undertake and promise to pay in the manner and form as in plaintiff's declaration charged, and of this they put themselves upon the country, &c.

W. & J. R. YERGER,
Atto's for Def'ts.

2. And the said defendants, by attorney, come and defend, &c., and for further plea in this behalf say that before the institution of this suit they had fully paid and satisfied the notes in plaintiff's declaration mentioned. And this they are ready to verify.

W. & J. R. YERGER,
Atto's for Def'ts.

3. And the said defendants for further plea, &c., by attorney come and say that when the promissory notes in the plaintiff's declaration mentioned were made and endorsed, the defendant, Virginia
13 Banks, was a married woman, the wife of the defendant Andrew D. Banks, and they say that said promissory notes were made and endorsed by the said Virginia as the surety and accommodation endorser of the said Andrew D., and for the purpose of enabling him, the said Andrew D., to obtain money and supplies for the purpose of conducting and carrying on a plantation cultivated by him, the said Andrew D., and not by the said Virginia, and said notes were not made and endorsed in payment of money and supplies furnished to the said Virginia to enable her to cultivate a plantation belonging to the said Virginia as her separate property, in accordance with a contract made to that effect with plaintiffs, and so defendants say that said promissory notes and endorsements are without legal consideration as to the said Virginia, and she is not liable to pay the same. And so they say that the said Virginia did not promise in manner and form as plaintiffs in their declaration have alleged, and of this they put themselves upon the country, &c.

W. & J. R. YERGER,
Atto's for Def'ts.

(Endorsed:) Filed Ap'l 24th, 1871. Geo. T. Swann, cl'k. (Endorsed:) Filed May 8th, 1874. Geo. T. Swann, clerk.

14 And afterwards, to wit, on the 8th day of May, A. D. 1871, being a day in the regular May term, A. D. 1871, of said court, the following order was made in said cause, in words and figures following, to wit:

BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS. } 1218. Continued.

And afterwards, to wit, on the 23rd day of January, A. D. 1872, being a day in the regular November term, A. D. 1871, of said court, the following order was made in said cause, in words and figures following, to wit:

BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS. } 1218. Continued on motion of defendants.

15 And afterwards, to wit, on the 16th day of February, A. D. 1872, being a day of an adjourned term of said court, the following replications were filed in words and figures following, to wit:

Replication.

Circuit court.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW BANKS.

1. And said plaintiff, as to the plea of defendants by them above pleaded as a second plea, says that the said defendants had not fully paid said demand in plaintiff's declaration set forth nor any part thereof, and of this plaintiff puts himself upon the country.

W. B. PITTMAN,
Att'y for Plaintiff.

2. And the said plaintiff, as to the said plea thirdly plead by defendant, Virginia Banks, saith that is true that said Virginia Banks was a married woman, but he saith he ought not to be precluded by reason of anything said plea above alleged from having and maintaining his said action, because he saith that said notes in said declaration were not made and endorsed by said Virginia Banks as accom-
16 modation surety for her husband, Andrew D. Banks, as alleged in said plea; plaintiff says that said notes were made and endorsed by said Virginia Banks in payment of necessary plantation supplies to enable her to cultivate her separate plantations in Madison County and in Warren County, Mississippi, and that said supplies were furnished and delivered to her by said Dennit & Lewis, commission merchants of New Orleans, and that these notes were given for the payment of such plantation and family supplies, and necessaries for family use, as a married woman is allowed by law to purchase on credit, and bind her separate estate therefor, and they pray that this may be enquired of by the country.

W. B. PITTMAN,
Att'y for Plaintiff.

(Endorsed:) Filed Feb'y 16th, 1872. G. T. Swann, clerk.

And afterwards, to wit, on the 7th day of May, A. D. 1872, being a day in the regular May term, A. D. 1872, of said court, the following order was made in said cause in words and figures following, to wit:

BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS. } 1218. Continued.

17 And afterwards, to wit, on the 6th day of May, A. D. 1873, being a day in the regular May term, A. D. 1873, of said court, the following order was made in said cause in words and figures following, to wit:

BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS. } 1218. Continued.

And afterwards, to wit, on the 15th day of November, A. D. 1873, being a day in the regular November term, A. D. 1873, of said court, the following order was made in said cause in words and figures following, to wit:

BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS. } 1218.

Leave granted plaintiff to amend declaration and replications, and continued.

And afterwards, to wit, on the 8th day of May, A. D. 1874, being a day in the regular May term, A. D. 1874, of said court, the following amended declaration was filed in words and figures following, to wit:

Amended declaration.

UNITED STATES OF AMERICA:
In the circuit court of the United States for the southern district of Mississippi, to the May term thereof, A. D. 1871.

18 BANK OF AMERICA
vs.
A. D. BANKS AND VIRGINIA BANKS.

The Bank of America of New Orleans, Louisiana, a corporation created by and under the laws of the State of Louisiana, by its president and cashier, plaintiff, complains of Virginia Banks and of her husband, Andrew D. Banks, defendants, citizens of Mississippi and residents of this district, for that whereas, to wit, on the 14th day of February, 1866, the said Virginia Banks was the owner of a plantation in her separate right, constituting part of her separate estate under the laws of the State of Mississippi, situate in the county of Madison, known and described as the southeast quarter of section twenty-three, the east half of section twenty-six, the southwest quarter of section twenty-four, except that portion lying south of the public road, and the west half of the west half of the southeast quarter of section twenty-four, all in township seven, range one east (S. E. ¼ of S. 23, E. ½ S. 26, S. W. ¼ S.

24, except that par ng south of public road, & W. ½ of W. ½ of S. E. ¼ S. 24, all in T. 7 R. 1, E.), containing six hundred and forty acres, more or less, and was at said time in like manner the owner of a
19 plantation situate in the county of Warren, in said last mentioned State, known as the Freeland place, containing seven hundred and seventy-seven acres more or less, and more accurately described as follows: S. E. ¼ sec. 7, S. end of section 8, W. ½ of section 9, W. ½ of N. E. ¼ section 10, section 11, and W. ½ section 12, all in town. 14, range 1 east, and the said Virginia Banks being in need of supplies for said plantations applied to Dennis & Lewis, who were commission merchants, doing business as such in the city of New Orleans, for money and supplies for the purpose of the proper cultivation of said plantations, and the said Virginia Banks and her said husband did then and there enter into contract with the said Dennit & Lewis to obtain said supplies for the plantations of said Virginia Banks as aforesaid, and did thereby obtain said supplies and money for that purpose to the amount of six thousand dollars, and did then and there execute and deliver to the said Dennit & Lewis, to secure the payment therefor, their three several joint promissory notes.

The first of said notes was dated the 14th day of February, 1866, payable to their own order on the first day of November next there-
20 after, with interest at the rate of eight per centum per annum after maturity until paid, in the sum of two thousand dollars and by them endorsed in blank.

The second note was dated the same day, payable in the same manner and in the same sum, on the first day of December of the same year, at the same rate of interest after maturity and likewise endorsed by said defendants.

The third note was of same date and tenor in all respects as the other notes above described, except the same was payable on the first day of January, 1867, and was in the same manner endorsed in blank by said defendants, Virginia Banks and Andrew D. Banks, copies of which said notes are herewith filed and made part of this declaration.'

Said defendants did deliver said three notes so executed and endorsed to said Dennit & Lewis, and said Dennit & Lewis, before the maturity of said notes, to wit, on the 1st day of September, 1866, sold and assigned the same, by delivery, for valuable consideration, to the said Bank of America; and the said Virginia Banks and Andrew D. Banks became thereby indebted to the said Bank of America in the sum of six thousand dollars, which said indebtedness the said Bank of Amer-
21 ica, the plaintiff herein, was and is entitled to have enforced and satisfied out of the separate property and estate of said Virginia Banks aforesaid.

And the said defendants being so indebted, did undertake and promise to pay the said sum of money to said plaintiff according to the tenor and effect of said notes. But nevertheless, said defendants, totally disregarding their promises in the premises, have not paid said sum of money or any part thereof, to the damage of the plaintiff in the sum of nine thousand dollars.

Plaintiff further avers that the said Virginia Banks is now the owner of the property herein described, and has continued to own the same as her separate estate as aforesaid from the inception of said contract for supplies therefore as aforesaid, up to this time.

Wherefore the said plaintiff brings this suit and prays judgment for the amount of said debt and interest and costs against the said defendant, Andrew D. Banks, and against the separate estate and property of

the said Virginia Banks, hereinbefore described, that the said judgment may be enforced and satisfied out of said separate estate according to the statute in such case made and provided.

PITTMAN & PITTMAN,
Attorneys for Plaintiff.

(Endorsed:) Filed May 8, 1874. Geo. T. Swann, clerk.

22 And on the same day and date as aforesaid, the following amended declaration was filed, in words and figures following, to wit:

Amended declaration. Additional counts filed by amendment by leave.

BANK OF AMERICA
vs.
ANDREW D. BANKS AND VIRGINIA BANKS.

2. The said plaintiff complains further of said defendant's for that whereas, to wit, on the 14th day of February, A. D. 1866, the said Virginia Banks, who was then, and now is, the wife of the said defendant, Andrew D. Banks, was the owner of a plantation in her separate right, constituting part of her separate estate under the laws of the State of Mississippi, situate in the county of Madison, known and described as follows, viz:

The southeast quarter of section twenty-three, the east half of section twenty-six, the southwest quarter of section twenty-four, except that portion lying south of the public road, and the west half of the west half of the southeast quarter of section twenty-four, all in township range one east (S. E. ¼ S. 23, E. ½ S. 26, S. W. ¼ S. 24, except that part lying S. of public road, and W. ½ of W. ½ of S. E. ¼ of S. 24, all in T. 7,
23 R. 1 E.), containing six hundred and forty acres, more or less; and was at the same time in like manner the owner of a plantation situate in the county of Warren in said last-mentioned State, known as the Freedland place, containing seventeen hundred and seventy-seven acres, more or less, and more accurately described as follows, viz: Southeast quarter of section seven; south end of section eight; west half of section nine; west half of northwest quarter of section ten; section eleven; and west half of section twelve; all in township fourteen, range 1, east; and said defendants did, at the time aforesaid, contract with Dennit & Lewis, who were commission merchants and cotton factors, doing business as such in the city of New Orleans, in the State of Louisiana, for supplies for the plantations aforesaid; and also for family supplies or necessaries, and for wearing apparel for the said Virginia Banks and for her children, and for the education of her said children, and for household furniture, and for a carriage and horses, and for buildings on her said lands, and for materials therefor, and for work and labor to be done for the use and benefit or improvement of her said separate property.

24 Plaintiff avers that the said Dennit & Lewis did in fact furnish said supplies and other articles aforesaid, and did pay for the education of the said children, and for work and labor done for the use and improvement of the separate property of the said Virginia Banks, as aforesaid; and that said defendants, in consideration of the premises, and to secure the payment to said Dennit & Lewis for the articles furnished and paid for as aforesaid by them, did, to wit, on the 14th day of February, 1866, execute and deliver to said Dennit & Lewis their three

several promissory notes, bearing date February 14th, 1866, and payable respectively on the first day of November, 1866, on the first day of December, 1866, and on the first day of January, 1867, to the order of themselves, and each in the sum of two thousand dollars for value received, with interest at the rate of $\frac{8}{100}$ per annum after maturity until paid, at the Louisiana National Bank, in the city of New Orleans, each endorsed by said defendants in blank, copies whereof are filed.

And plaintiff avers that said Dennit & Lewis, before the maturity of said notes, to wit, on the 1st day of September, 1866, did sell and
25 assign the same by delivery, for valuable consideration, to the plaintiff. And the said defendants thereby became indebted to the plaintiff in the sum of six thousand dollars, which said indebtedness the said plaintiff is entitled to have enforced and satisfied out of the separate property and estate of said Virginia Banks aforesaid.

And said defendants being so indebted, did undertake and promise to pay the said sum of money to said plaintiff according to the tenor and effect of said notes. But, nevertheless, said defendants, totally disregarding their promises in the premises, have not paid said sum of money or any part thereof, to the damage of the plaintiff in the sum of ten thousand dollars.

Plaintiff further avers that the defendant, Virginia Banks, is now the owner of the property hereinabove described, and has continued to own the same as her separate estate as aforesaid, from the inception of said contract as aforesaid.

Wherefore, plaintiff brings this suit and prays judgment against said defendants, and against the separate property and estate of said Virginia Banks, hereinabove described, that the said judgment may be enforced and satisfied out of the same according to the statute in
26 such case made and provided.

PITTMAN & PITTMAN,
Attorneys for Plaintiff.

(Endorsed:) Filed May 8, 1874. Geo. T. Swann, clerk.

And on the same day and date as before, the following plea was filed in words and figures following, to wit:

In the circuit court of the United States for the southern district of Mississippi.

BANK OF AMERICA
vs.
A. D. BANKS & WIFE.

And the said defendant, Andrew D. Banks, by his attorney, comes and says, action non, because, he says, that on the 31 December, 1868, he was adjudicated a bankrupt by the district court of the United States for said district, sitting in bankruptcy, on his own petition, and on the 17th day of March, A. D. 1870, he was duly and legally discharged from all debts and claims which by the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, was provable against his estate.

Defendant avers that the debt sued for in plaintiff's declaration was provable as against his estate under said act of Congress, and
27 this he is ready to verify.

Wherefore he prays, &c.

NUGENT & YERGER,
Attos. for Defendant.

(Endorsed:) Filed May 8th, 1874. G. T. Swann, clerk.

And afterwards, to wit, on the 6th day of November, A. D. 1874, being a day in the regular November term, A. D. 1874, of said court, the following plea of non assumpsit was filed in said cause in words and figures following, to wit:

BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS.

And now come the defendants and defend the wrong and injury, whence, &c., and say they did not undertake and promise and are not indebted in manner and form as the plaintiff hath above alleged against him, and of this they put themselves upon the country, &c.

W. L. NUGENT,
CATCHINGS & INGERSOLL,
Atty's for Defendants.

(Endorsed:) Filed Nov. 6th, 1874. Geo. T. Swann, clerk.

And afterwards, to wit, on the 30th day of November, A. D. 1874, being a day in the regular November term, A. D. 1874, of said
28 court, the following order was made in said cause in words and figures following, to wit:

BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS. } 1218.

Upon the motion of the plaintiff, it is ordered that the said plaintiff has leave to amend the declaration in the above-stated case by adding additional counts thereto as he may be advised.

And afterwards, to wit, on the 12th day of May, A. D. 1875, being a day in the regular May term, A. D. 1875, of said court, the following agreement of the counsel in said cause was filed in words and figures following, to wit:

Circuit court of the United States, southern district of Mississippi.
May term, 1875.

BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS. } 1218.

29 The parties hereto, by counsel, agree to waive a trial by jury, and consent that the matters of fact as well as of law, therein, be tried by the court. May 12, 1875.

W. L. NUGENT,
For Defendants.
PITTMAN & PITTMAN,
Att'ys for Plaintiff.

(Endorsed:) Filed May 12th, 1875. Geo. T. Swann, cl'k.

And on the same day and date as before, to wit, the 12th day of May, A. D. 1875, the following judgment was rendered in said cause, in words and figures following, to wit:

BANK OF AMERICA
vs.
VIRGINIA & ANDREW D. BANKS. } 1218.

This day came the parties, by their attorneys, and by written stipulation filed, waived a trial by jury and submitted the facts as well as the law to the court, when the court having heard the testimony and argument of counsel, finds:

First. That said A. D. Banks was before the commencement of this suit duly discharged from any liability upon the notes sued upon as averred in his plea.

30 Secondly. That said Virginia Banks was at the time she executed said notes a married woman, the wife of said A. D. Banks, as averred in her plea.

Thirdly. That said three notes were executed, not to secure any indebtedness then existing, but as a security for such advances in money or supplies as Denis & Lewis to whom they were delivered, endorsed in blank, might thereafter make to said A. D. Banks.

Fourthly. That said Denis & Lewis transferred said notes to plaintiff in the usual course of business.

Fifthly. That said Denis & Lewis did thereafter advance to said A. D. Banks in money and supplies more than the amount of said notes, which remains unpaid. That a portion of these supplies were shipped to two plantations which were held and owned by Mrs. Virginia Banks and her two children by her former marriage, under the will of her former husband, of whom she was the executrix, which trust had not then been closed, and which plantations said A. D. Banks was cultivating during the year 1867, on his own account and in his own name, under a verbal contract of lease with said Virginia for a stipulated money rent. There is no proof whether or not Denis & Lewis knew of this

31 lease, nor that they had any information as to whether or not Mrs. Banks had any interest in said planting enterprise. The whole of said account was kept in the name of Freedland Place, one of said plantations, but contained many items for supplies to other plantations in which said A. D. Banks had an interest, and also a number of items having no relation to any of the planting interests.

No charge is made for any advances made to said Virginia Banks for her plantation or otherwise.

Sixthly. That a deed of trust was executed by said Virginia and Andrew D. Banks on one of said plantations to secure the notes sued on, which recited that it was to secure an indebtedness of said Virginia Banks.

It is therefore considered by the court that the defendants be discharged, and go hence and recover of the plaintiffs their costs, but without prejudice to any proceedings in equity as to any liability of said Virginia Banks as security for said A. D. Banks.

And afterwards, to wit, on the 4th day of June, A. D. 1875, being a day in the regular May term, A. D. 1875, of said court, the following special finding of facts by the court was filed in said cause in words and figures following, to wit:

32 BANK OF AMERICA
vs.
VIRGINIA BANKS AND ANDREW D. BANKS. } 1218.

This day come the parties, by their attorneys, and by written stipulation filed, waived a jury and submitted the facts as well as the law to the court, when the court having heard the testimony and argument of counsel finds:

First. That said A. D. Banks was, before the commencement of this suit, duly discharged from any liability upon the notes sued upon as averred in his plea.

Secondly. That said Virginia Banks was, at the time she executed said notes, a married woman, and the wife of A. D. Banks, as averred in her plea.

Thirdly. That the said three notes of Virginia and A. D. Banks, in the declaration mentioned, were executed not to secure any existing indebtedness, but as a security for such advances in money and supplies as Denis & Lewis, cotton factors, to whom they were delivered, drawn to their own order and endorsed by them, the said makers, in blank, might thereafter make upon the order of A. D. Banks for plantation purposes.

33 Fourthly. That said Denis & Lewis transferred said notes to plaintiffs in the usual course of business.

Fifthly. That said Denis & Lewis did thereafter advance to said A. D. Banks, in money and supplies, a large amount which remains unpaid, and that of these supplies an amount as large in value as the aggregate amount of the three said notes were shipped to and used in the cultivation of two plantations which were held and owned by said Virginia Banks and her two children by her former marriage, under the will of her first husband, of whose will she was the executrix and which trust had not then been fully executed; that said A. D. Banks, husband of Virginia, was cultivating these two plantations during the year 1866, on his own account and in his own name, under a verbal contract of lease made by him with said Virginia, his wife, for a stipulated money rent; that there is no proof that Denis & Lewis, or the plaintiff, knew of this verbal lease, nor that they knew whether or not M'r's Virginia Banks was or was not interested in said planting enterprise, but the court finds that they did know of her interest in the plantations themselves; that the whole of said account was kept in the name of the Freeland

34 plantation, one of said two plantations, but said accounts contained many items for supplies to another plantation in the cultivation of which said A. D. Banks had an interest, and also other items having no relation to any of the planting interests.

Sixthly. A deed of trust was executed by said Virginia and A. D. Banks, cotemporaneously with the making of the notes sued upon, upon one of the two plantations in which Virginia Banks had an interest, to secure these notes, in which it is recited that it is made to secure the indebtedness of said Virginia Banks.

Upon this state of facts it is considered by the court that the defendants be discharged and go hence and that they recover their costs, but without prejudice to any proceedings in equity to hold said Virginia Banks liable as security for her said husband, A. D. Banks.

This finding of facts is made and filed as part of the record in said

cause in lieu of a more full and complete statement than that stated in the judgment of the court in this cause.

This June 4th, 1875.

R. A. HILL, *Judge.*

(Endorsed:) Filed and entered June 4th, 1875. Geo. T. Swann, clerk.

35 UNITED STATES OF AMERICA,
Southern District of Mississippi, ss:

I, George T. Swann, clerk of the circuit court of the United States for said district, hereby certify that the preceding annexed twenty-eight (28) pages contain a full, true, and complete transcript of the record of the pleadings, proceedings, and final judgment of our said circuit court in the cause in the caption stated, lately pending & determined in our said court, as the same remains of record therein, together with true copies of the petition for writ of error and writ of error bond on file in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said circuit court, at office in Jackson, in said district, this 21st day of June, A. D. 1875, and in the year of our Independence the 99th.

[SEAL.]

GEO. T. SWANN,
Clerk U. S. Cir. C't So. Dist. Miss.

Clerk's fee for transcript, $8.50; paid by plaintiffs in error July 21, '75.

GEO. T. SWANN, *Clk.*

(Indorsement on cover:) No. 349. The Bank of America, plaintiff in error, vs. Virginia Banks and A. D. Banks. S. Mississippi C. C. U. S. Filed 25th January, 1876.

SUPREME COURT OF THE UNITED STATES.

NO. 349.

THE BANK OF AMERICA,

VS.

VIRGINIA BANKS AND A. D. BANKS.

Brief for Plaintiff in Error. By W. B. Pittman, Attorney.

SUPREME COURT OF THE UNITED STATES.

NO. 349.

THE BANK OF AMERICA,

VS.

VIRGINIA BANKS AND A. D. BANKS.

Brief for Plaintiff in Error. By W. B. Pittman, Attorney.

This is suit at law against Virginia Banks and her husband A. D. Banks, to recover out of her separate property for supplies furnished upon the order of her husband, to cultivate two plantations, in which she owned an interest in her own right.

The facts are briefly as follows, as shown by the finding of the Court upon page 13 of printed record:

A. D. Banks, the husband of Virginia, residing in the State of Mississippi, applied to Denis & Lewis, Commission Merchants, in New Orleans, for advance of money and supplies, to cultivate for the year 1866, the two plantations owned by Virginia Banks as her separate property, in common with her two children

whose interest she controlled as Executrix of her former husband then deceased. When A. D. Banks applied for these advances, he presented three notes of his wife Virginia Banks, for two thousand dollars each, and a deed in trust executed by said Virginia Banks, wherein she recited that the debt created by said notes was her separate debt. On these written representations the firm Denis & Lewis shipped supplies and furnished money for the two plantations owned by said Virginia Banks to an amount equal to that specified in the notes, and said supplies and money were used by said A. D. Banks in cultivation of said plantations. Other supplies were furnished said Banks and used on other plantations for which, however, no claim is made in this suit. In defense it was shown that a verbal lease of said plantations owned by Virginia Banks was made to her husband A. D. Banks, during the year of 1866. The time of this lease was not shown, and there was no proof showing whether it was made before or after the supplies were contracted for and obtained from Denis & Lewis.

This pretended lease between the husband and wife was secret and unknown to Denis & Lewis, or to the assigns of the notes, but Denis & Lewis did know of Mrs. Banks' interest in the plantations, and as the deed of trust shows made the advances on the faith thereof.

On this state of facts the Court below found for the defendant and dismissed plaintiff's suit.

The error complained of here is that the Court misapplied the law to the above facts.

Our contention is that upon the fact as stated in the finding of the Court upon page 13 of the record plaintiff in error was entitled to judgment for the full amount sued for.

The Court below lays stress on the fact that the supplies were ordered by A. D. Banks the husband, and seems to forget that under our Code the husband was the proper party to make such contracts and give such orders for the wife.

In the case of Cook vs. Ligon 54th Missssippi, page 373, it is held by the Supreme Court of the State.

1st. That a wife's separate property is bound by the purchase of plantation supplies, whether bought by herself or by her husband with or *without* her consent, and that for this purpose the husband is the wife's agent in invitum, and is made so by section 1780, Revised Code of Mississippi, 1871, which is copied verbatim from a section of the Code of 1857, in force at the time the contract sued on was made.

2d. That from this obligation nothing will discharge her estate save an express contract that it shall be released or something equivalent thereto, and that the separate property of the wife is, therefore, *primarily* bound for supplies purchased for and used on her plantation.

The decision in the case above quoted from 54 Mississippi was rendered after the Court had decided the present case, and the Court in the trial of the case did not, therefore, benefit this construction of the Statute by the Supreme Court of Mississippi.

The same general principles had been announced by the Supreme Court of Mississippi before, however, in the cases Guion vs. Doherty 43, Miss. 538, and Clopton vs, Matheny, 48 Miss., 285. In the last case mentioned the Court holds that the acceptance of a note of the husband by the creditor for the debt contracted by the purchase of supplies for the wife's plantation is no release of

the debt against the wife's separate property, unless there is a special agreement to that effect.

And again that the wife is bound by the husband's contract as to price and time of payment, and that an extension as the time of payment obtained by the husband by giving his note to the creditor enures to her benefit, and that such an extension would prevent the Statute of Limitations from running in favor of the wife against the creditor.

From these decisions it is evident that the supplies obtained by the husband A. D. Banks, would have been a charge upon the wife's estate even if procured without her knowledge and consent. The law of Mississippi gives the husband the right to cultivate his wife's plantation, and to make contracts for supplies binding upon her separate property without her consent, and does not attach the condition that it shall be cultivated by the *wife and for her own use.* And, therefore, the fact that by a private arrangement between the wife who was the principal and her husband who was her agent even against her will, that he should receive the profits of the cultivation of the plantations over and above a certain sum to be paid to her as rent, cannot effect the right of the creditor to recover on a contract made by the husband which he had full power under the law to execute, and which by its very nature bound the separate property of the wife. But in this case it is not necessary for the plaintiff to rely upon the authority conferred by Statute upon the husband, for the Court finds that in the defendant Virginia Banks, in a deed of trust solemnly executed, represented in writing that the debt sued on was her separate debt and for separate use.

By this solemn declaration, made for the purpose of

obtaining the advances sued for, she is estopped now to claim that these supplies were for her insolvent husband. The Court below held that the doctrine of estoppel in pais did not apply to a married woman in such a case. It is clear, however, that the Court committed error in this respect.

The law as laid down in Bishop on Marrirge, 2d vol., sections 494, 403, 592, is that the doctrine applies to married women wherever its application is necessary to prevent fraud. A number of decisions are cited to support this principle from the Supreme Courts of the various States.

This has been decided to be the law in Mississippi in recent decision made by the Supreme Court in the case as Wright vs. Walton, which will be reported in the 55th Mississippi, now in the press. In that case the Court held that if the wife represented to the merchant that supplies and money obtained by her were for her plantation she was estopped from denying it afterwards, and that the merchant advancing the supplies was not bound to show that they were used in the cultivation of the wife's plantation, and that that the wife cannot show that the money and supplies were in fact obtained for her husband, and used by him in his own business. If the 55th Mississippi is not published before the submission of this case we will furnish a certified copy of the opinion of the Court in this case. It is useless for us to argue to this learned Court, that the facts in this case warranted and demanded the application of the doctrine of estoppel in pais to prevent fraud. There could not be a bolder case of fraud than for a woman to represent in writing to the merchant that she or her husband wanted supplies to cultivate her separate plantations,

the debt against the wife's separate property, unless there is a special agreement to that effect.

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and afterwards be allowed to escape liability by proving that her representations were false, and that in fact she had privately rented her places to her insolvent husband, and did not want the supplies for her own use at all.

On page 4th of defendant's printed brief it is stated that she rented the plantations in question to her husband as Executrix, and that she had the right so to lease them. The Court did not find that she leased as Executrix, and did find that she had an interest in her own right in said plantations. She had no right to lease as Executrix to her husband, because by law he was required to give the bond for his wife as Executrix, and without qualifying became de facto, by the right of his wife, Executor, and was compelled to perform all the duties of Executor for his wife, and therefore, a lease from his wife as Executrix would have been a lease from himself as Executor to himself as an individual which would be clearly void.

In 1st Howard Miss., Edmundson vs. Roberts, page 322, it is said:

"The husband of an Executrix is bound without qualification as Executor to exercise the powers of Executor vested in his wife."

The lease from the wife in her individual capacity to her husband would be equally void. At common law the husband and wife were considered one. Every transaction or contract between them made during coverture was void. The Code of Mississippi emancipates the wife holding separate property, and removes some of her disabilities touching such property, but does not remove her disability to trade and contract with her husband, because that disability rests upon a different reason from the disability to deal with third parties, to-wit: That she is under the coercion of her husband. In most

of the important contracts she is empowered to make as to her separate estate, she is required to be assisted and joined by her husband, and in some of them as we have shown in the case of plantation supplies the husband makes the contract for her without her consent or knowledge. The law presumes that the husband will prefer her interest to that of a stranger, and in making the few contracts she is permitted to make, from the relations and common interests of the two, the wife presumably has the advice and assistance of her husband in the most immaterial, in all the most important the concract itse'f must show that he has done his duty in this behalf. But in trading and trafficing with her husband his interest must adverse to hers and she will most likely be over-reached by his superior knowledge of business, or will readily yield to any demand made by him through love or fear of him. Therefore, no section of the Code of Mississippi authorizes the wife to contract with the husband, and without some special Statue to this effect the disability of the common law touching contracts with the husband must remain. Prior to the Code of Mississippi enacted in 1837, though the married women could hold and enjoy her separate property a deed from the husband to the wife was void because of the common law disability which had not been removed. The Code of 1757 gave the husband the right to convey to the wife, but did not give the wife the power to convey to the husband or to contract with him.

See Boggett vs. Beard, 41 Miss., page 531.

There is nothing in the proposition that the defendant did not own the plantations entirely in her own right. The Supreme Court of Mississippi decided in the case of Allen vs. Johnson 48 Miss., page 413, that any interest owned by the married woman could in proper case be

subject to the payment of contracts the law permitting her to make. The Court has found that Mrs. Banks had an interest in the plantations furnished, and that the parties furnishing the supplies knew of that interest, and that a deed of trust executed upon one of these plantations to secure this debt recited that the debt was her separate liability. Nor is there any force in the suggestion of Counsel that the present suit should have been brought in Chancery. By Statute the common law Courts are given concurrent jurisdiction with the Chancery Courts for the enforcement of contracts of married women in the State of Mississippi.

Choppin vs. Hermon et. ux., 46 Miss., page 204.

W. B. PITTMAN,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 349.

THE BANK OF AMERICA, PLAINTIFF IN ERROR,

vs.

VIRGINIA BANKS AND A. D. BANKS.

In error to the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR DEFENDANT IN ERROR BY

WILLIAM L. NUGENT, ATTORNEY.

Clarion Print, Jackson, Miss.

Supreme Court of the United States.

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BRIEF FOR DEFENDANT IN ERROR BY

WILLIAM L. NUGENT, ATTORNEY.

This case must turn upon the third plea of defendant Virginia Banks, and the replication thereto. This plea presents the defence that the notes sued on were made and endorsed by the said Virginia as the surety and accommodation endorser of her husband, to enable him to obtain money and supplies for the purpose of conducting and carrying on a plantation cultivated by him, and not in payment of money and supplies furnished *to her to enable her to cultivate a plantation belonging to her as her separate property, in accordance with a contract to that effect.* This plea and the replication thereto propound the substantial defence of Mrs. Banks under the amended declaration.

The amended declaration alleges that, when the notes were executed, Mrs. Banks was the owner of a plantation in her separate right, constituting part of her separate estate under the laws of Mississippi, situated in the county of Warren, and of another in the county of Madison, *and being in need of supplies, contracted therefor with the plaintiff's endorsers; and in carrying the contract into execution gave the notes in controversy, proceeds of which were used in the purchase of supplies for her use.* These facts are essential to a recovery by the plaintiffs, and had to be *proven* before the plaintiffs could possibly be entitled to judgment. The plea to the amended declaration puts them in issue. A. D. Banks, the husband, was discharged in bankruptcy. The special finding of facts responds to the issue presented by the pleadings, and upon that the case must turn here.

It appears, from this finding, that Virginia Banks was a married woman when the notes were executed; that the notes were given as a security for such advances in money and supplies as Denis & Lewis, cotton factors, might thereafter make upon the order of A. D. Banks for plantation purposes; that thereafter Denis & Lewis did advance *to A. D. Banks*, in money and supplies, a large amount which remains unpaid; that of these supplies an amount as large as the aggregate amount of the three notes was shipped to and used in the cultivation of two plantations, which were *held and owned by said Virginia and her two children by a former marriage, under the will of her first husband, of which she was the executrix, and which trust had not then been fully executed*; that said A. D. Banks was cultivating these two plantations, during the year 1866, on his own account and in his own name, under a verbal contract of lease with the said Virginia for a stipulated money rent; that plaintiffs knew of her interest in these plantations; that the account current of Denis & Lewis was kept in the name of the Freeland place, though it contained many items for supplies to another plantation in the cultivation of which A. D. Banks had an interest, and, also, other items having no relation to any of the planting interests;

and that a deed of trust was executed by Virginia D. Banks and her husband upon one of the two plantations in which she had an interest to secure these notes, in which *it is recited* that it was made to secure the indebtedness of the said Virginia D. Banks. This is the plaintiffs' case.

On the facts I insist that the judgment of the court below is correct. Our statute, in force in 1866, defines and limits the capacity of a married woman to contract. She may rent her lands, or make any contract for the use thereof, may contract for the use thereof, may contract for supplies for her plantation, and for the employment of an agent, for family supplies and necessary wearing apparel of herself and children, etc. Code 1857, p. 336, arts. 24, 25 and 26. She is not authorized to make a *promissory note*, and no liability can be fixed upon her separate estate except in discharge of a contract authorized specially by the laws of the State. The proceeding, even then, becomes a *quasi* proceedieg *in rem* to subject the property to the payment of a legitimate debt. The subject has undergone frequent adjudication in the Supreme Court of Mississippi, and the question is not now an open one. The liberty of contracting pertains to the thing contracted about and does not extend to the person. The enforcement of the contract is in the nature of a proceeding *in rem* and no general judgment can be rendered. The married woman cannot execute a valid promissory note, and though she give one for what may be a charge upon her separate estate, recovery can be had only by showing the consideration. Mallett vs. Parham, 52 Miss., 921; Nelson vs Miller, Id. 410. To authorize a judgment against a married woman her liability must be shown by an averment in the declaration or replication and *established by the evidence*. Cary vs. Dixon, 51 Miss., 593. See Nicholson vs. Heiderhoff, 50 Miss. 56; McDuff vs. Beauchamp, Id. 531; Viser vs. Scruggs, 49 Miss., 705; 46 Miss., 625; 44 Miss., 457; 43 Miss., 61; 49 Miss., 308.

In this case, with these decisions before us, there can be no difficulty in reaching a conclusion. The two plantations referred

to in the pleadings belonged to a former husband of Mrs. Banks who died testate; she was the executrix of the will, and the trust had not been closed at the time the notes were given. The plantations were cultivated by A. D. Banks, the husband, during the year 1866, on his account and in his own name, under a verbal contract of lease with the said Virginia Banks, for a stipulated money rent. That is to say, Virginia Banks, as executrix of the last will of her former husband, in the execution of the trusts of the will, leased the two plantations to her husband, who cultivated them on his own account and in his own name. No question is here made as to the lien created by the trust deed upon whatever of interest in the plantations she might have, after the trusts of the will were satisfied: that appertains to another and different forum. It is manifest, therefore, that in giving the notes and mortgage she was only doing so as surety for her husband. The contract, on this account, was not warranted by law, and is void. The supplies *must have been purchased for her plantations, to be binding on her—of course when cultivated in her own interest and for her own benefit.* She had the right to lease and did lease them as executrix; they belonged to the devisees under the will; and had to be disposed of so as to subserve the purposes of the will. In the absence of any facts negativing the presumption, this court must conclude that the lease was authorized and *bona fide*, and that conclusion affirms the judgment.

The finding of facts, it seems to me, completely negatives the idea of a contract in the interest and for the benefit of the wife, and here the effort is to bind the wife and subject her separate estate in a court of law—not to enforce the lien given to secure payment of the notes. These notes are void as personal obligations; of themselves they import no liability whatever. If liable at all the consideration of the notes must be shown to be within the letter of the statute. Besides, the wife is not shown to have any interest in the lands capable of appropriation to payment of the debt. When the trusts of the will are completely executed she may have none. At any rate, it is evident that the remedy of the

plaintiff is in a court of equity alone. The fact that the deed of trust recites that the notes were given to secure the indebtedness of Virginia Banks does not operate as an *estoppel*. In Mississippi it is held that a deed from a married woman without the statutory acknowledgment is a nullity. Allen vs. Lenoir, 53 Miss., 321; Willis vs. Gattman, Id. 721. Parties under disability, as infants and married women, are not estopped unless their conduct has been intentional and fraudulent. Bigelow on Estoppel, 486 and note 1. A married woman is not estopped by a recital in her deed, else by inserting clauses in a contract disconnected from, and independent of it, she would be enabled to do what the law itself disallows; and under color of a deed, which she can make, her separate estate could be bound in a case not warranted by law. Bigelow on Estoppel 276; Tyler on Infancy and Coverture, 726, 727, 731, 733, 734.

WILLIAM L. NUGENT,
Attorney for Banks.

Supreme Court, United States.

October Term, 1879.

THE BANK OF AMERICA, *Plaintiff in Error,*

vs.

VIRGINIA BANKS AND A. D. BANKS.

W. B. PITTMAN,
A. B. PITTMAN.
for plaintiff in error.

R. O. POLKINHORN, PRINTER,

Supreme Court, United States.

October Term, 1879.

THE BANK OF AMERICA, *Plaintiff in Error,*

vs.

VIRGINIA BANKS AND A. D. BANKS.

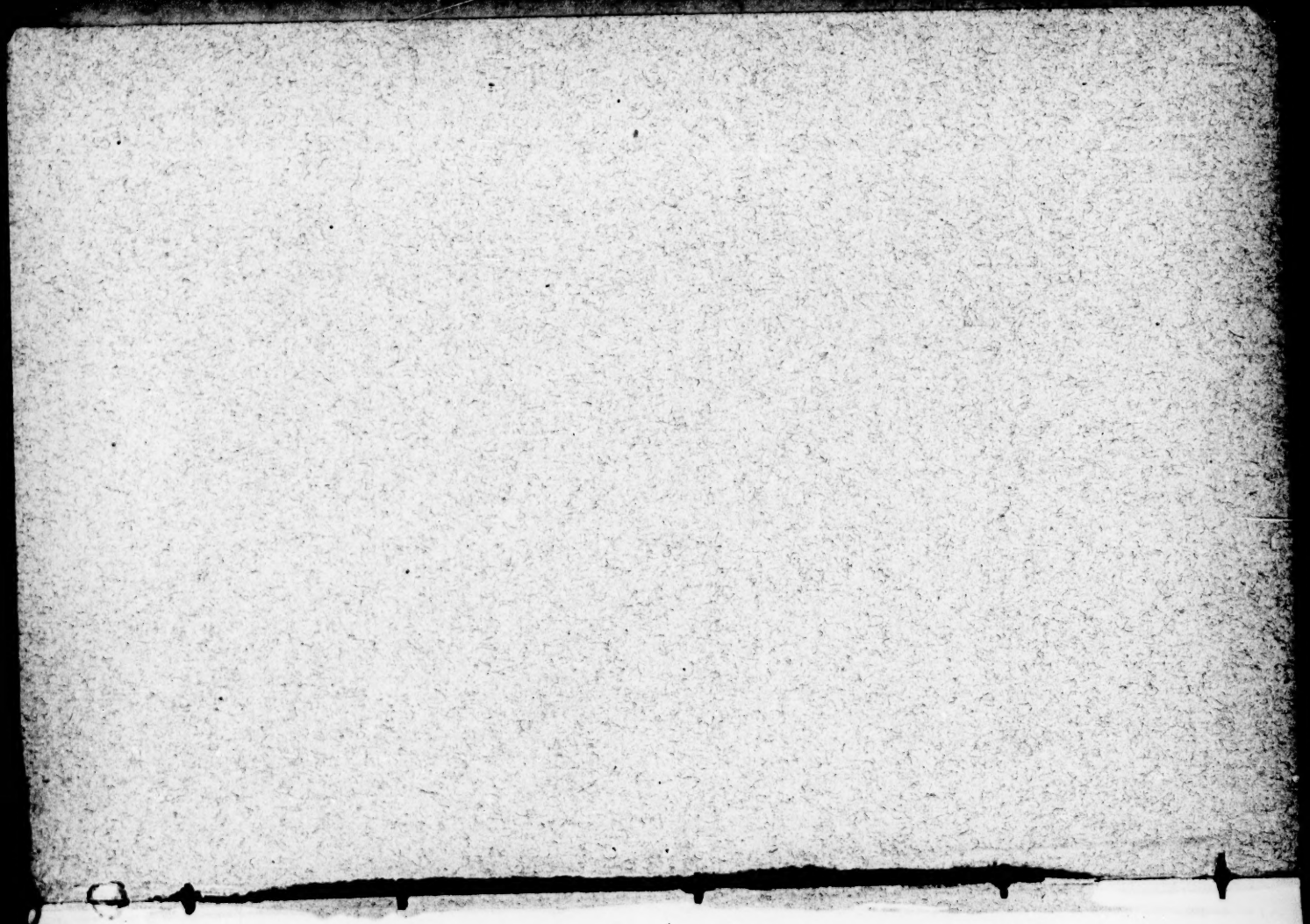
Brief and Argument in behalf of Plaintiff in Error, by Pittman & Pittman.

The questions in this case arise on the construction and application of a part of § 1780, Revised Code of Miss., of 1871, which is as follows:

"*And all contracts made by the husband and wife, or by either of them, for supplies for the plantation of the wife, may be enforced, and satisfaction had out of her separate estate.*"

The mode of enforcing such contracts and obtaining satisfaction is prescribed by section 1783, same Code, as follows:

"In addition to the remedies now existing by common law, by and against married women, the husband and wife may sue jointly, or, if the husband will not join her, she may sue alone for the recovery of any of her property or rights; *and she may be sued jointly with her husband on all contracts or other matters for which her individual property is liable.*"



Supreme Court, United States.

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The special findings by the court on p. 13 of the Transcript of Record, brings the case fully within the letter of the law. The consideration of the notes sued on was "supplies for the plantation of the wife."

In addition to these facts, it is further found that these supplies were actually used in the cultivation of the wife's plantation to an extent, at least, equal to the aggregate amount of the notes sued on.

It is further found that the notes were secured by a deed of trust executed by said Virginia Banks, in which it is recited that these notes evidence the indebtedness of said Virginia Banks.

The fact upon which the defense is based, is that said A. D. Banks, her husband, was cultivating these plantations *on his own account* instead of for her benefit, "*under a verbal contract of lease made by him with said Virginia for a stipulated money rent.*"

Now, the question is, can that fact avail the defendant. The lower court so decided, and we presume some of the members of this learned court were of the same opinion.

Whether we shall be able to establish to the satisfaction of the entire court that such judgment is intrinsically erroneous on principle or not, we will be entitled to their judgment if we shall show that the Supreme Court of Mississippi holds that such facts do not constitute a defense.

We shall endeavor to establish both propositions.

The scope and substance of the defense is, that the supplies, though suitable for use in the cultivation of the wife's plantation, and though actually so used, did not benefit the wife, but rather the husband in view of the lease.

It is argued that, although the statute does not say that it must be shown that the cultivation is for the wife's use, that is the spirit and intent of it. Without controvert-

ing that for the present, we will say that this lease, conceding its validity, rendered the use of the supplies, to say most of it, a misappropriation. It certainly cannot have any greater effect than a misapplication or conversion to his own use in some other mode. This is assuredly giving to the secret, verbal lease, its greatest possible effect. If he had used all these supplies on other plantations, or re-sold them for his own profit, the defense would be strengthened by the consideration that the misappropriation consisted of visible physical acts, of which plaintiffs might possibly have had notice, and, which is still more important, it would have been susceptible of proof other than the mere statement of the parties. Giving to this lease, however, the full effect claimed for it: it fails, under the construction placed on our law by the highest tribunal, to afford any defense or answer to the plaintiff's demand.

In the case of *Wright* vs. *Walton*, MSS., the Supreme Court of Miss., considering this very question, uses the following language:

"The husband is constituted agent by law for a limited purpose—to provide a certain class of necessaries. He deals with the merchant as agent, and can bind his principal within the scope of his power. Nor is the merchant any more bound to see that the horse or mule or implement is carried to the wife's farm and there used than he is to look after the use of one hundred barrels of flour which an agent appointed by his principal is authorized to buy for a particular use. If the agent of the purchaser converts the flour to his own use, the seller is not affected by it."

The conclusion reached in the case just cited and quoted follows, as a necessary sequence, from the authority which the statute confers on the husband in this regard. Its extent will be seen by examining the case of *Cook* vs. *Ligon*, 54 Miss., 372, from which we extract the following:

"First, as to the plantation supplies, as to these, the statute, Code, §1780, makes the husband the agent of the wife, *in invitum*, so far as she is concerned. Her separate estate, therefore, will be bound for their purchase, whether bought by himself, or by him with, or without her consent. From this liability, nothing will discharge her estate, save an express contract, that it shall be released, or something equivalent to it."

A husband, then, has authority to purchase supplies and bind the wife's estate, without her knowledge, and without nay, against her consent. The law entrusts this power to him. The creditor need not see to the appropriation of the articles bought. In this state of the law, this lease, still conceding its validity, cannot possibly affect rights of creditors who have sold the supplies with all the precautions required. We have even gone further and shown that the supplies were used in the cultivation of the wife's plantation.

That a debt so created precisely in accordance with the requirements of the law, by and with the consent of the two persons authorized to bind the estate, can be avoided and defeated by setting up and swearing to a secret, undisclosed, verbal contract *between themselves*, a contract of which plaintiffs in error knew not of, a contract evidenced by no physical or visible act, seems utterly inconsistent, not only with the letter and spirit of the statute, but with sound principle and good morals. The Supreme Court of Mississippi, the tribunal upon which is imposed the duty of construing Mississippi statutes, says, the seller need not see that the plantation supplies are used for the wife's plantation. The Federal Courts, construing the same statute, deny recovery to the seller, because of an alleged misapplication of which none, save the husband and wife, can know anything. The agency of the husband relative to the purchase of supplies for the wife's plantation, exceeds, in its scope, any other

kind of agency. He is an agent *in invitum*; an agent by virtue of marriage; an agent by virtue of special authority in this case; and an agent by the law whose authority is irrevocable. Keeping this in mind, let us consider how a principal would stand by the law of agency in ordinary cases. The absolute fraud of the agent, in purchasing and converting supplies, would not relieve his principal if he had authorized the purchase; much less would any mere secret or undisclosed arrangement between the principal and agent operate the detriment of a third person dealing with the agent as such, the agency, to all appearance, remaining unchanged.

We have so far considered this lease, in its relations to this case, as valid. While a husband may give to his wife, there is no law or decision in Mississippi which authorizes a wife to bind herself by contract with her husband. The lease of her land, as between themselves even, was void, Can it be doubted that the products of that year's planting might have been claimed by the wife, and her claim enforced by proceedings in chancery? The lease would have availed her husband nothing as defense to her bill for account. The decisions of our Supreme Court have guarded. with jealous care the protection afforded the wife by the common law, in the disabilities attached to her estate.

The case of *Robinson & Stevens* vs. *Robert Powell*, cited in last brief of Mr. Nugent, counsel for the defendant in error, is not in point on any question raised in this case. It simply decides that a wife may lease from her husband, and not that the husband may lease from the wife. As we have shown before, the husband may convey to the wife, but the wife cannot convey to the husband.

As at common law equity will confirm and enforce a contract of the husband in favor of the wife, if its enforcement is beneficial to the wife's separate estate; but the hus-

band cannot enforce any executory contract against the wife's separate estate.

The same brief, on page 21, says it does not appear that defendant had any separate estate, from the findings of the court.

In fifth section of the findings of the court, it is said: And that of these supplies, an amount as large in value as the aggregate amount of the three said notes, were shipped to and used in the cultivation of two plantations, which were held and *owned* by said Virginia Banks and her two children," &c. And, again, in the sixth paragraph, it is found: A deed of trust was executed by said Virginia & A. D. Banks, contemporaneously with the execution of the notes sued upon, upon one of the two plantations which in Virginia Banks had an interest, to secure these notes, in which it is recited that it is made to secure the indebtedness of said Virginia Banks. We have shown, by decisions cited before, that it is unnecessary to show that the married woman owns the entire place, but that it is sufficient to show that she had an interest in the plantations supplied, although undivided.

This court, cannot, as counsel intimates, take these plantations away from her either as executrix or in her own right.

It can only render a judgment against her interest, and direct that interest, whatever it may be, to be sold to satisfy the judgment. In the brief of Hon. Jos. R. Chalmers, page 8, it is said that the recital in the deed of trust was merely evidence, and that the court found that in fact that it was not the debt of the wife, but of A. D. Banks, and that said "A. D. Banks was cultivating, during the year 1867, said plantations on his own account, and in his own name."

We submit that all of the above is conclusion of law, and

not of fact. The court found specific facts, and deduced from these facts the conclusion of law that Banks owed the debt, and that the cultivation was on his own account. We think we have shown that if it is true, as found by the court, that Mrs. Banks stated in writing that the debt was hers, and thus induced the merchants to furnish the goods on the credit of her plantations, as conclusion of law, the debt is hers.

W. B. PITTMAN,
A. B. PITTMAN.
for plaintiff in error.

Supreme Court of the United States.

NO. 86.

THE BANK OF AMERICA, PLAINTIFF IN ERROR,

vs.

VIRGINIA BANKS AND A. D. BANKS.

ARGUMENT OF WILLIAM L. NUGENT, FOR DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Southern District of Mississippi.

Clarion Steam Print, Jackson, Miss.

Supreme Court of the United States.

NO. 86.

THE BANK OF AMERICA, PLAINTIFF IN ERROR,

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ARGUMENT OF WILLIAM L. NUGENT, FOR DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Southern District of Mississippi.

We find ourselves constrained to offer, for the consideration of the Court, some further suggestions requiring the affirmance of the judgment rendered by the Circuit Court of the Southern District of Mississippi, in this case. The rights and liabilities of a married woman are clearly defined by our statutes and have been frequently discussed by the Supreme Court of Mississippi. Code of 1871, §§ 1778, 1779, 1780; 47 Miss., 189; 49 Miss., 550; 51 Miss., 840; Id., 157; 52 Miss., 787; 54 Miss., 90, 353, 359, 368, 485, 652. "Any married woman," says the statute, "may rent her lands, or make any contract for the use

thereof, and may loan her money, and take securities therefor, in her own name, and employ it in trade or business." Code 1871, § 1780. It would seem, therefore, that, under this statute, the wife's disabilities are, *pro hac vice*, displaced, and that her capacity to rent her lands is quite equal to that of a *feme sole*, so that the contract is within the terms and letter of the law. The only question that could be made in this case, it appears to us, is, can she lease her land to her husband? It would be dificult to answer why *not*. The barrier to such a transaction growing out of the common law disability, has been removed; there are, as to the property of the wife, *two persons* instead of one, with rights and liabilities totally distinct and independent; there is nothing in the laws of Mississippi to prevent the exercise of the statutory right in favor of the husband; and certainly this Court could not create a public policy for that State by *quasi* judicial legislation. That a wife can lease land from her husband was decided in the case of Robinson & Stevens vs. Robert Powell, trustee, the opinion in which, being unreported, is here given at length, and with the Clerk's certificate in verification, attached:

SUPREME COURT OF MISSISSIPPI.

Robinson & Stevens,

No. 3040. vs.

Robert Powell, Trustee.

I, Oliver Clifton, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the annexed and following two pages contain a full and true copy of

the Opinion of the Court in the above styled cause delivered on the 12th day of May, 1879, as the same appears of record in my office.

Witness my hand and the Seal of said Supreme [L. S.] Court, at office, at Jackson, this, the 3d day of July, A. D., 1879.

OLIVER CLIFTON, Clerk.

By C. C. CAMPBELL, D. C.

3040.] ROBINSON & STEVENS, vs. ROBERT POWELL, Trustee.

CHALMERS, J., delivered the Opinion of the Court.

If the testimony offered by plaintiffs in error had been admitted, we should be entirely content with the verdict found against them; because we should regard it as a mere question of fact and of credibility with which we should not have felt at liberty to interfere. But the exclusion of the testimony must have been based upon the idea that the law imposed an insuperable barrier to such a transaction, as was here offered to be proved, *to-wit:* The renting of land from a husband by his wife, and the making of a crop thereon, the ownership of which belonged in the wife. This is erroneous. Such transactions must always be regarded with suspicion, and are highly calculated to produce fraudulent results. It might perhaps be wise to prohibit them by legislative enactment, just as the hiring of the services of the wife by the husband (*and vice versa*) had been prohibited by the Legislature. But until the Legislature shall see fit to prohibit such transactions, we know of no principle of law that forbids a wife to grow a crop on land rented by her from

her husband, he taking no part whatever in its production. The case of *Hamilton* vs. *Booth*, 55 Miss., 60, is not inconsistent with this doctrine. In that case there was no pretence that the wife owned either the fee or a term in the land, and the crop was produced by the labor and supervision of the husband. In this case the wife claims to have rented the land and to have produced the crops without any sort of assistance from the husband.

For the error in the exclusion of testimony, the judgment is reversed, and cause remanded.

Not to be reported.

The notes sued on are simply *nullities* unless life be imparted to them because of the consideration upon which they were given. In *Cook vs Ligon*, 54 Miss., 373, it is said that the statutes make the husband the agent of his wife, *in invitum*, for the purchase of plantation supplies, and that the estate of the wife is primarily liable for all supplies *purchased for and used on her plantation*. Section 1780 of the Code of 1871, was construed in *Grubbs vs. Collins*, 54 Miss., 488, 489, and nothing can be plainer than the language of the Court: "That section makes the husband agent to purchase plantation supplies for his wife's farm, but plainly applies *only to those plantations which are cultivated for the wife's account and benefit, and not to those which she has leased, and which are in the possession and under the control of the tenant.*" These supplies, therefore, must have been *purchased and used on a plantation cultivated for the wife's account and benefit* and not for one leased by

her. In this last case the Court say: "The husband had exclusive control of the plantation for the year 1875; the supplies taken up were for the use of his tenants on the farm and others to whom he made advances, and were not plantation supplies for account or benefit of the wife." So that when the husband leases the property of the wife, or the wife the property of the husband, the rule invoked by counsel for plaintiffs in error cannot apply. The wife must be the beneficiary of the *cultivation*, to make her separate property liable for plantation supplies purchased by her husband; the supplies must have been purchased for account of the wife *in fact* to subject her separate estate to the necessity of paying for them. This is required by the statute and the wife has no power, by stipulation, deed or contract to do more. Her contracts, sheltered by this statute, as expounded by the Supreme Court of Mississippi, are valid; if, *in fact*, the contract in the case be not so protected, her separate property is not bound and cannot be bound by any mere recitation in her deed.

The decision to which we have called attention sustains the lease in this case. It is true that such transactions must always be regarded with suspicion as they are highly calculated to produce fraudulent results. It might be wise to prohibit them altogether by legislation; but until they are prohibited they must be sustained when established to the satisfaction of the Court. The case of Wright vs. Walton does not trench upon the doctrine here contended for. This will be apparent from an examination of a certified copy of the opinion delivered in

that case, which must be construed with reference to the facts involved. We append that opinion at length because it is not now reported. The opinion was delivered by Chief Justice Simrall, whose mind seems to have been particularly directed to the solution of all the questions of difficulty which have arisen under our married woman's law. The whole scope of the opinion applies to a case in which a married woman is *actually engaged in the cultivation of her separate plantation on her own account and for her own benefit.* When this is the fact the agency of the husband arises by virtue of the marital relation; but when the wife has leased her plantation for a year or more, there can be no such agency because the wife herself could not then make a valid contract of credit for "plantation supplies." The opinion, however, speaks for itself:

SURREME COURT OF MISSISSIPPI.

Hamilton Wright, et al.,

No. 2577, vs.

Charles A. Walton, et al.

I, Oliver Clifton, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the annexed and following ten pages contain a full and true copy of the opinion of the Court in the above styled cause delivered on the 6th day of May, 1878, as the same appears of record in my office.

Witness my hand and Seal of said Supreme
[L. S.] Court, at office, at Jackson, this, the 25th day of July, A. D., 1879.

OLIVER CLIFTON, CLERK,
By C. C. CAMPBELL, D. C.

HAMILTON WRIGHT, *et al.*,
vs.
CHARLES A. WALTON, *et al.*

SIMRALL, C. J., delivered the opinion of the Court.

At the close of dealings between Hamilton Wright, a merchant at Vicksburg, and Charles Walton, his customer, two notes were given by the latter, payable (at the request of the former) to his wife Lucy. The accounts had extended through a period of several years, and were had with firms of which Hamilton Wright was a partner and in part with himself; Stites being his first associate, succeeded by Edrington. As these changes occurred, Walton's account was transferred from one firm to another. At the date of the settlement Wright represented to Walton that the connection between himself and Edrington had been or was about being dissolved, and this account, in the division of *assets*, had fallen to him.

The course of the transactions between Walton and Wright were such as were usual between a merchant in the city and his customer in the country, except that much more was brought into their dealings than was common between a planter and his commission merchant. At the beginning of the connection, Walton was a retired merchant, his affairs unsettled, and he kept a desk in the office of Wright & Co. for the convenience of winding up his business. His wife had a plantation in Hinds county managed by him. The crops of cotton were consigned to Wright & Co., or Wright and Edrington, as the firm might be, for sale, and groceries and supplies generally, for the family and the plantation were furnished by them

on Walton's orders; cash was paid and drafts honored without question or enquiry as to the use to which the money or the goods were to be put.

Mrs. Walton seems to have committed her plantation and all that was upon it, to the entire discretion of her husband, permitting him to dispose of the crops as he pleased, without inquiry as to whether he was disposing of them prudently or not. She knew that Wright was his commission merchant, but seems to have had no information as to the state of the accounts—whether her husband was a creditor or debtor. Walton was not altogether destitute of resources. He owned two policies of insurance which were transferred as security for the notes. In his account were many things having no connection with plantation or family necessaries. He was advanced $4,000 for a cotton speculation and was charged with his part of the loss. He drew money to meet his part of the loss. He drew money to meet the expense of making and burning brick, to pay debts to sundry persons. He dealt with the wife's property and its income as if it were his own absolute property.

The question is, whether Mr. Walton's notes are chargeable on the wife's property, and if so, whether for the whole amount or less, and by what criteria is Mrs. Walton's property liable. She admits that her husband had her consent to buy whatever was needful for the plantation and the family, but disputes and contests the creditors' right to charge more than that on her property. The married woman's law places her property under her exclusive control and diposition, except that sales and

conveyances and incumbrances must be the joint act of herself and husband, and except also, that the husband alone may make "contracts for supplies for the wife's plantation." Let us see if other parts of the statute afford any aid in ascertaining the meaning of the words "*contracts* for supplies" for her plantation. After the marriage the wife may acquire property among other modes, "by deed of conveyance, recovery, etc." She may be the recipient of property, in any of the modes by which it may be transferred from one person to another. She may be voluntary donee or a purchaser. If the 1778th section of the Code stood alone, it might be argued with plausibility, that since she may acquire property by "deed of conveyance," she must also have the implied right to enter into an engagement to pay for it in future. But purchases are negatived by the next section, §1779. "And any married woman may purchase, etc., with her own money" Section 1780, after stating that a wife may rent her lands, loan her money and employ it in trade or business, declares that she jointly with her husband, or either of them, may make contracts for supplies for her plantation. She must have a "plantation" before she or the husband can make a "supply" contract. *Her plantation* is the predicate of the power to make the contract; a false representation that she has such property will not estop her from averment that the *fact* was otherwise. The statute does not allow her to obligate herself to pay for property bought on a credit; such an obligation could not be enforced. But there are a class of obligations she can assume; among

them are contracts for "supplies for plantations." The Legislature entrusted the husband (having regard to the ordinary needs of the agriculturist) with power to bind property for "supplies." Primarily the word was used by the law-maker to include all those things required and used by the planter in the production and preparation of the crops for consumption or for sale. If it be said that the family must be supported, and the term embraces food and raiment for them, the answer is furnished by a later part of the same section, namely, that supplies, necessaries and conveniences for the family, are not necessarily chargeable on the wife's property; she is not liable for them, unless she bargains to be, or unless the husband buys them on her account and with *her consent*. The purchase must be by her and on her credit; the husband can act for her as agent "with her consent," and not otherwise. The language is, "all contracts made, etc., for family supplies * * * wearing apparel for herself and children, household furniture, carriage and horses, * * etc." The contract must be for the *things themselves*, taking the entire text with which the words quoted are connected, and we would gather the idea to be that whatever constituted food, raiment, education, furniture and such like, were the class of things for which the wife may contract. If she has not the money she may incur debts for these, and for buildings on her land, materials therefor, and work and labor thereon. Taking into view the entire body of the statute, we deduce this legislative will. Whilst the married woman may enlarge her estate by purchase, she must do so with

ready money. She shall not subject her property to obligations solvable in the future. That is an extent of capacity with which it would not be prudent to entrust her, but if she owns lands employed in agriculture, she or her husband may make contracts for plantation supplies, and if she has not money, she or he may buy on a credit, and payment be enforced out of her estate. She may contract for these supplies just as she can for the building of a house, or for work done for the improvement of her estate, as fencing ditching or the like. But it is said that money is as much a "supply or necessary," as grain, a mule or a plow. If, therefore, the "contract" be to reimburse money borrowed to pay for plantation supplies, as to buy grain, a mule or husbandry implements, it is within the statute.

The argument is, if the "money" is got for the the "purpose" of paying laborers or buying "supplies," the contract is good, although the money may not be so used The proposition is that the husband may borrow money for such purpose, yet if he directs it to a totally different purpose it does not affect the contract, the lender is not bound to see to its appropriation. It is said that it is the "contract" which the statute makes good, and not the actual use of the supplies, and that the creditor does not lose his debt if the wife can show that the grain or mule or implements were never taken by the husband to her farm and that the seller is not bound to see that the plantation gets the benefit of them.

The statute makes the husband the agent (general agent) to buy supplies. When, therefore, he proposes to

procure those things which, according to usage and custom, are necessary for the prosecution of agricultural operations, *he presents* himself as dealing for his principal. His relation as husband and the use to which the things are to be put suggest the scope of his authority. His statutory agency is limited to contract for supplies. In *Herman & Co.* vs. *Perkins*, 52 Miss., 815, the objection was that part of the goods were not "necessaries" for the cultivation of a farm or plantation as used in the Act of 1867, for the "encouragement of agriculture." We felt that the subject was beset with difficulties and without undertaking to enumerate or classify what were "necessaries," we referred the determination of the question to the usages and customs of the agricultural interest, taking into account the system of agriculture as we actually have it."

Perhaps a more definite rule could not be laid down. Now the statute of 1871 intends that the husband may contract for the same sort of supplies, and we must, by the same rule, ascertain what they are. The observation in the cause cited is applicable to the one now under consideration "where the former has, in good faith, taken up the goods on the faith of the lien, and is questioned whether this article or that falls within the law, there ought to be evidence that the things were not needed for farm purposes or that they were not fit or adapted to that use."

The interpretation of the married woman's law has been uniform that the wife cannot borrow money though she state that it was procured to be expended for support

of her family or supplies for her plantation. The statute does not confer capacity to borrow money. But it was ruled in *Brown* vs. *Helm*, Miss., and *Viser* vs. *Scruggs*, 49 Miss., 706, that if her liability attached it was by reason of the use of it for maintenance of her family, improvement of her estate or some other such like purpose. The advance of the money was, by such use, brought within the equity of the statute. These cases were deliberately followed in *Reed* vs. *Coleman*, 52 Miss., 838. There Wood and wife executed two notes for $500 each, with mortgage to secure advances of money and supplies to be thereafter made to Mrs. Wood. It was held that the notes imposed no liability on her, but if all, or any part of the money was actually used for any of the purposes for which she could contract under the statute, to that extent, there would be a valid debt by virtue of such use. The principle ruled was that a note given by a married woman for future advances of money and supplies for plantation and family, does not bind her. But in so far as supplies were got and money used for her benefit, as explained in *Viser* vs. *Scruggs*, *supra*, she would be liable and the security enforced. It, by no means, follows that because the wife has separate property that she is liable for household and family supplies. The fortune of the wife does not relieve the husband from his duty to maintain the family. The onus is not devolved on the wife unless she consents to assume it. The question so warmly contested in *Guion* vs, *Doherty*, 43 Miss., 551, was whether the goods were bought on the credit of the husband or on the credit of the wife, with

her consent. The defence was that, although Mrs. Guion had a separate estate, she was not responsible, unless the goods were bought on her account, she consenting thereto. This Court ruled that the issue was properly left to the jury by the Court. That was followed by *Cook* vs. *Ligon*, 54 Miss.

The husband is constituted agent by law for a limited purpose. To provide a certain class of necessaries. He deals with the merchant as agent and can bind his principal within the scope of his power. Nor is the merchant any more bound to see that the horse or mule or implement is carried to the wife's farm and there used, than he is to look after the use of 100 barrels of flour which an agent appointed by his principal is authorized to buy for a particular use.

If the agent, after the purchase, converts the flour to his own use, the seller is not affected by it. That is a question between the principal and agent and is no reason why the principal should not pay the debt which he was authorized to buy. So the husband is clothed with statutory power to "contract" for his wife for those things needed on her farm. If he buys a line of goods suitable for that use and ordinarily so applied, his contract is within his power and liability at once attaches to the wife's property, and it is no defence to plead that her husband misapplied the goods, and she got no benefit from them. But where the demand is made of the wife for money paid to the husband in person or on his orders and drafts to the extent of thousands of dollars, the enquiry assumes another aspect. Would the express promise of the wife

to refund, bind her, second, if she had given previous consent to the merchant that she would repay money advanced to the husband bind her. And lastly, if she had thus become indebted to the merchant on a direct advancement (to) herself or payment of her orders would she be bound. And if so, in any of these circumstances, upon what precise ground? To borrow money is not one of the things that the statute gives her power to do. Certainly not in terms. It is not a contract for "supplies" or "necessaries" in the sense of the statute.

When it is said, as in *Viser* vs. *Scruggs*, that the *use* of the money may create a liability, no other idea is conveyed than that if she lays it out for food and raiment for her family, or to build a house, she has made a lawful use of it, and the advancer of it occupies as meritorious ground as would the merchant if he had sold his goods on a credit, or the mechanic had erected the house on the same terms. The rule is she can't make a "contract" to repay borrowed money, but she may get such benefit by the use of it for certain purposes that the Court will hold her bound to refund it.

The decree is affirmed.

The findings of fact by the Court present the issue as made up between the parties. After the execution of the notes sued on, Dennis & Lewis advanced to *A. D. Banks* an amount in supplies equal to the aggregate amount of the three notes, which were used in the cultivation of two plantations, *held and owned by Virginia Banks and her two children of a former marriage, under*

the will of her first husband, of which she was executrix, which trust had not then been fully executed. These plantations were cultivated, during the year 1866, by A. D. Banks, *on his own account, under a verbal lease* from Virginia Banks for a stipulated money rent. The merchants knew of Mrs. Banks' interest in these plantations, and that accounts were kept in the name of the Freeland Plantation, but contained many items of supplies for another plantation in the cultivation of which A. D. Banks had an interest, and other items, having no relation to any of the planting interests. It being adjudicated that the plantations referred to were leased for the year by A. D. Banks, the controversy ought to end. She had the right to rent the land, as to her own interest certainly, and to make a *verbal contract* of lease for one year. Code 1871, § 2892. As to the interest of her two children under the will of their father, she exercised the same right, whether rightfully or wrongfully, makes no difference. Her trust is not yet ended and her interest in the places may be nothing or amount to nothing.

The third stipulation in the finding of facts recites that the notes were indorsed to Dennis & Lewis in blank, as a security for such advances in money and supplies as they might thereafter make upon "the order of A. D. Banks for plantation purposes," but the finding no where states that the consideration of the notes sued on was "supplies for the plantation of the wife." The distinction is plain. The money and supplies were for *plantation purposes*, but not for the *plantation of the wife*, under our statute as expounded by the Court. The supplies were not used

in the cultivation of the wife's plantation, nor did the Court so find, with all due deference to counsel. They were used by A. D. Banks in the cultivation of two plantions *leased from his wife as executrix of her former husband's will.* They were held and owned by her and her two children under that will.

The ignorance of this arrangement by Dennis & Lewis cannot impair its efficacy, nor could the capacity of the wife be made to turn on any such existent fact. It is not thought that the mere recitation in the trust deed as to the consideration of the notes being the indebtedness of the wife, can affect a *suit at law* upon the notes, whatever its effect might be in a proceeding to forelose the mortgage given by her to secure them. I do not understand that the decision of this Court in *Canal Bank vs. Partee*, at the last term, has any bearing upon the present controversy whatever. Two propositions of law were settled in that case: 1. That a general judgment in an ordinary action of assumpsit against a *feme covert*, upon a promissory note executed by her, was a nullity and liable to a collateral attack, and 2, that the complaining creditors were not deprived of the benefit of the trust deed sought to be foreclosed because of the failure to accept it as prescribed by the deed in view of the fact that certain of them had accepted the proposition tendered before the deed was executed, and, as to the others, the stipulation has been waived by the grantors. I should incline to the opinion that, in the absence of proof to the contrary, the recitation in the deed would be *prima facie* evidence of liability on the part of the married woman; but nothing

more. Certainly she cannot be *estopped* by the recital. *Palmer vs. Cross*, 1 *S. & M.* 48; *Herman Estoppel*, 485; *Lowell vs. Daniels*, 2 *Gray*, 161, 168; *Weatherhead's Lessee vs. Baskerville*, 11 *How.*, 329; *Concord Bank vs. Ballis*, 10 Cush, 276. The reason is, that she cannot by her own act enlarge her legal capacity to convey or bind her estate. A modification of the rule, I know, was made by the Supreme Court of Mississippi in *Parmelee vs. McGinty*, 52 Miss., 475, and *Shivers vs. Simmons*, 54 Miss. 521, but those two cases stand wholly upon distinct grounds. In the former, the guardian, had exchanged one lot of ground belonging to his ward for another which the ward sold, after attaining her majority, and used the proceeds of sale. That was held to be a *confirmation* of the guardian's *voidable* act. In the other, the married woman actually sold the land and received the price in the conveyance of other lands to her, which she afterwards sold and placed beyond the reach of a decree for rescission. Her conveyance was defectively executed, and she was not allowed, under the circumstances, to repudiate her exchange of lands. In other words the Court of Chancery would not sanction a gross fraud. The declaration of the Court, on the petition for a reargument, is, that married women cannot use the rights conferred upon them by statute, to defraud others; but this declaration cannot go beyond the transaction to which it relates. In this very case, to a bill for foreclosure, there might be some plausibility in the argument that Mrs. Banks would not be allowed to set up a state of facts inconsistent with the declaration in her deed, if to allow her to do so would com

pass a gross fraud upon creditors who had trusted to it There the contract might be allowed to stand; but this proceeding is for a judgment at law in order to reach *other property than that contained in the deed.* With this suit the mortgage has no connection; it rests on wholly different grounds.

The doctrine of agency invoked in *Wright vs. Walton*, *supra*, does not apply to this case. It is true, that when a wife is cultivating a plantation for her use and benefit, her husband is her agent and his contracts for plantation supplies are binding on the plantation so cultivated. He is her agent *in invitum*, but his power to contract cannot exceed that of his *principal*. The statute reads: "And all contracts made by the husband and wife, or by either of them, for supplies *for the plantation of the wife*, may be enforced, and satisfaction had out of her separate estate." Code 1871, § 1780. The wife can contract for plantation supplies when she has one, and when it is in process of *cultivation* for her use and benefit. Otherwise, she has no capacity, and can have no agent. The specious argument of adverse counsel is thus shorn of its apparent force. If the wife's plantation is being cultivated for her use and benefit, as said in ~~Robinson & Stevens~~ Wright vs. Walton ~~Powell~~, *supra*, her husband can purchase plantation supplies, and notwithstanding their misappropriation by him the separate estate thus being cultivated, would be bound. There must be the power in the wife, however, to contract before that power could be delegated to her husband, for the plain reason that there must be a principal before there can be an agent. Now if the wife could not

make the contract relied upon in this case, the husband was powerless to do so. It would be monstrous if any other rule were adopted. As it is, a husband may defraud his wife out of her whole property, and the views expressed in Wright vs. Walton will lead to very dangerous results. The wife can venture, at her peril, upon the cultivation of her plantation. By that act her husband becomes clothed with a very dangerous power. She may supervise her own planting interests and purchase her own supplies; and yet her husband may go to a neighboring town or city, purchase plantation supplies ostensibly for her plantation, move them to a distance, dispose of them and pocket the proceeds, leaving his wife in the lurch. The object of the law was to aid and not to ruin her; to give her the benefit of her husband's supposed superior business qualifications and not make him the instrument for her oppression and ruin. The Constitution emphasizes this idea. "The rights of married women shall be *protected* by law in property owned previous to marriage; and also in all property acquired in good faith by purchase, gift, devise or bequest after marriage: *provided*, that nothing herein contained shall be so construed as to protect said property from being applied to the payment of their lawful debts." Con. Miss., Bill of Rights, Art. 1, Sec. 16. The mandate to the Legislature and to the Courts is to protect, and not, by a train of casuistical reasoning, destroy property rights. It was, doubtless, in view of this section in the said bill of rights that the Supreme Court has limited the capacity to contract for plantation supplies to a case in which the wife's plantation was cultivated by

her for her own use, and to deny the right when her plantation was *leased* either to negro tenants or to one tenant, and that tenant her husband.

The learned Counsel have greatly mistaken Mississippi law and Mississippi decisions when they assert that a wife cannot lease her plantations to her husband. The very reverse of this statement is the truth, and the lease is not void. It would puzzle Counsel in view of the Mississippi Statutes, to give even a plausible reason for their round assertion. They have mistaken the law of the case as they have misinterpreted the findings of the Court.

A few words more and I have done. Mrs. Banks is the executrix of her first husband's will, and her trust is not fully accomplished. She must have leased the plantations in the execution of her powers as such executrix because she could not otherwise have disposed of them. She, with her two children, holds and owns these places under that will; but, by what tenure, and upon what conditions, we cannot gather from the Court's finding. The learned District Judge supposed it to be sufficient to find that she so held the places and that she had leased them to her husband. Suppose she had no separable interest in the plantations, can this Court undertake to take them from her possession as executrix, and thus defeat what may be the express provisions of the will to the contrary. Or will the Court not say that it does not appear from the findings that she had *any separate estate* in the plantations, and, therefore, without reference to the questions of law in the cause, that the plaintiffs in error have failed to show the possession of separate property, without which there could be no right to any recovery.

WILLIAM L. NUGENT.
Attorney for Defendants in Error.

Supreme Court of the United States.

No. 86.

THE BANK OF AMERICA, PLAINTIFF IN ERROR,

vs.

VIRGINIA AND A. D. BANKS, DEFENDANTS IN ERROR.

ARGUMENT OF J. R. CHALMERS, FOR DEFENDANTS.

Error to the Circuit Court of the United States for the Southern District of Mississippi.

This is a suit at law seeking to hold the separate property of the wife, Mrs. Virginia Banks, liable for debts contracted for supplies furnished to A. D. Banks, her husband, to be used partly on the Freeland plantation, in which Mrs. Banks had an interest under the will of her first husband, Mr. Freeland.

Before the wife can be liable for such purchases, it must be shown—

1st. That she was the owner of the plantation for which the supplies were furnished.

2d. That the plantation was being worked and carried on for the use and benefit of the wife.

See Grubb *v.* Collins, 54 Miss., 488, 489.

The finding of the facts by the court negative, both these propositions. The court finds—

1st. "That a portion of these supplies were shipped to two plantations, which were held and owned by Mrs. Virginia Banks and her two children by a former marriage, under the will of her former husband, of whom she was executrix, which trust had not then been closed."

2d. "And which plantations said A. D. Banks was cultivating during the year 1867 on his own account and in his own name, under a verbal lease with said Virginia for a stipulated money rent." (Record, pp. 12 and 13.)

All the decisions in Mississippi concur in the proposition that the separate property of the wife is only liable for plantation supplies, and when they are purchased by the husband as her agent and for her use and benefit, which essentials are not only not shown by the facts in the case, but the facts as found by the court show precisely the reverse, that the plantation was being worked by the husband in his own name and for his own benefit.

That a wife may lease to the husband, has been directly decided by the Supreme Court of Mississippi in the case of *Robinson & Stevens* v. *Robert Powell, Trustee*, printed in the brief of Mr. Nugent, counsel for appellee in this case. (See Nugent's brief, pp. 3–6.)

The fact that the plantation in this case was leased by the wife to the husband, is found by the court. The argument that this was secretly done, might have been urged before the court below to show that there had been no lease; but such an argument here, upon the facts, can be of no avail unless it goes to the extent of showing that the finding of facts by the court was manifestly erroneous.

There is another portion of the facts, as found by the court below, to which I wish to direct attention:

"The whole of said account was kept in the name of 'The Freeland place,' one of said plantations, but contained many items for supplies to other plantations in which said

A. D. Banks had an interest, and also a number of items having no relation to any of the planting interests." (Record, pp. 12, 13.)

In the case of Caldwell *v.* Hart, recently decided by the Supreme Court of Mississippi and not yet reported, it is decided that where it is shown that a portion of the supplies furnished were for plantation use and a portion for family use, and the exact state of the account in this regard is not given, no recovery can be had against the wife. That is fatal to appellant in this case, where it is shown that an unknown part of the supplies went to plantations in which Mrs. Banks had no interest; and still another unknown portion were "items having no relation to any of the planting interests."

This decision further holds the following:

"In all the cases decided by this court in which the supplies were charged to the husband, and yet payment for them was enforced out of the wife's estate, it appeared that, notwithstanding the goods were charged against the husband, the credit was really given to the wife, and it also appeared that the supplies were actually used for the benefit of the wife's estate."

Tested by this rule, the judgment of the court below in the case must be affirmed. I give the decision in full, as it has not been printed before:

Supreme Court of Mississippi.

Margaret Ann Caldwell
vs.
J. and B. Hart. } No. 3,172.

I, Oliver Clifton, clerk of the Supreme Court of the State of Mississippi, do hereby certify that the annexed and following seven pages contain a full and true copy of the opinion of the court in the above-styled cause, delivered on the 3d day of November, 1879, as the same appears of record in my office.

Witness my hand and the seal of said Supreme Court, at office, at Jackson, this the 6th day of November, A. D. 1879.

[SEAL.] OLIVER CLIFTON, *Clerk.*
By C. C. CAMPBELL, *D. C.*

Margaret Ann Caldwell
vs.
J. and B. Hart.

The appellees are merchants in the city of Jackson, and filed their bill in the Chancery Court of Hinds county against the appellant for the purpose of enforcing the collection out of her separate estate of an open account created by her husband. The bill exhibits the account and states that the appellees sold the goods mentioned in it to Charles Caldwell, the husband, and charged the same to him, supposing that he was the owner of the plantation, which really belongs to the wife. The bill admits that the entire credit for the goods was in the first instance given to the husband under the supposition that he was in fact the owner of the wife's estate, and that after the husband's death appellees sued his administrator and recovered a judgment, and that after such recovery they ascertained that the wife was the real owner of the plantation. The bill further charges that the goods sold to the husband were in fact for the benefit of the wife's separate estate, being supplies used and consumed in the cultivation of her plantation, and it is this alleged use which constitutes the equity of the bill as against the wife.

It will be observed that the bill does not seek to charge the wife's separate estate upon the ground that the husband claimed to be acting for and on behalf of the wife in making the purchases, or that the appellees considered him as her agent; but, on the contrary, it is distinctly averred that the appellees contracted with the husband as principal, extending to him personally the credit upon the belief that he was owner of the plantation. The sole equity of the bill to charge the wife's separate estate is that the appellees allege that they subsequently discovered that the husband purchased for the benefit of the wife's estate, which actually got the benefit of the goods. The answer positively denies that the goods or any of them were purchased for or used on the wife's estate, and there is no sufficient proof to over-

turn this allegation of the answer. It is now insisted that because the goods were purchased by the husband, and he stated they were for the use of the plantation which the appellees supposed to be his, but was really the wife's, that she is estopped to deny that they were received by her and used on the plantation and for her benefit.

We do not consider this a just view. If it be considered as an established rule, that when the husband professes to act for and on behalf of the wife, under his statutory authority to bind the wife's estate by his contracts for supplies for her plantation, and he is treated with by the merchant in that capacity, his mere statement that the supplies purchased by him were for the use of the wife's plantation would estop the wife from asserting the contrary, it would by no means follow that when he acts on his own behalf, and treats with the merchant on that basis, her statement as to the use which he intends to make of the goods would have the same effect. The reason why there would be an estoppel in the first case, if the estoppel were allowed at all, would be that the husband being accredited with an agency which he assumed to execute, is also accredited to make any statement within the scope of his authority concerning the business which he is transacting. The party could only know by his statements whether he was proposing to act as agent rather than in his own behalf, and if as agent, whether the particular contract was on behalf of his principal. It is too clear for controversy that when a person, who is an agent, contracts in his own name, and in his own behalf, and on his own credit, he alone is responsible. If it be sought to charge an undisclosed principal on such a contract, it must be shown that the contract was really in behalf of the principal and for his use; but then the seller must make his election to charge the principal before payment by the principal to the agent, and whilst the state of accounts between principal and agent is in favor of the latter. (Story on Agency, sec. 291 and note.)

In this case the husband contracted on his own behalf, and in his own name, and on his own credit, which is admitted by the appellees to have been good at the time. He did not even pretend to be an agent; he made no declaration that he was acting for the benefit of the wife's estate or on her behalf; and it is attempted now to show that

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We do not consider this a just view. If it be considered as an established rule, that when the husband professes to act for and on behalf of the wife, under his statutory authority to bind the wife's estate by his contracts for supplies for her plantation, and he is treated with by the merchant in that capacity, his mere statement that the supplies purchased by him were for the use of the wife's plantation would estop the wife from asserting the contrary, it would by no means follow that when he acts on his own behalf, and treats with the merchant on that basis, her statement as to the use which he intends to make of the goods would have the same effect. The reason why there would be an estoppel in the first case, if the estoppel were allowed at all, would be that the husband being accredited with an agency which he assumed to execute, is also accredited to make any statement within the scope of his authority concerning the business which he is transacting. The party could only know by his statements whether he was proposing to act as agent rather than in his own behalf, and if as agent, whether the particular contract was on behalf of his principal. It is too clear for controversy that when a person, who is an agent, contracts in his own name, and in his own behalf, and on his own credit, he alone is responsible. If it be sought to charge an undisclosed principal on such a contract, it must be shown that the contract was really in behalf of the principal and for his use; but then the seller must make his election to charge the principal before payment by the principal to the agent, and whilst the state of accounts between principal and agent is in favor of the latter. (Story on Agency, sec. 291 and note.)

In this case the husband contracted on his own behalf, and in his own name, and on his own credit, which is admitted by the appellees to have been good at the time. He did not even pretend to be an agent; he made no declaration that he was acting for the benefit of the wife's estate or on her behalf; and it is attempted now to show that

he was really acting for his wife, not by proving that the wife received the benefit of the contract, nor that the husband was secretly acting for her, but by proof only that the husband did not have the use for the goods which he stated he had at the time he bought them.

The agency of the husband to make contracts for supplies for the plantation of the wife, where no consent of the wife is shown, results from a purely statutory power, which he may exercise or not at his discretion. He is under no obligation or duty to exercise it, and his agency for the wife exists under the statute only when he makes such a contract or professes so to act for the wife. Because he possesses this power is no reason why, when refusing to exercise it, he may not act for himself. His personal rights and powers are not absorbed in this power to act for the wife, nor destroyed nor suspended by the existence of the marital relation. Marriage imposes no disabilities on him. In this case the contract of the husband and appellees was a contract in which the latter was seller and creditor, and the former was purchaser and debtor. It conferred no rights, imposed no obligations on any third party. Both parties were free agents, and had a right to make the contract. If the creditor seeks to hold another party liable for the avails of the contract, he must do it on some other ground than his right to enforce the contract against one who is no party to it. There is such a ground, and it arises out of the obligation of the wife to pay for a benefit which her estate has received from the money or goods of a third party. But the benefit must be shown to have been received, for without its reception there is no duty on the wife to pay. When this obligation is imposed by a court of equity, it is not the enforcement of the contract made by the husband on his own credit and professedly for his own use, but the giving a right in opposition to the contract. By the contract in this case the husband was debtor for supplies furnished for his benefit, and the enforcement of it would be compelling him to pay his own debt. But the relief sought is to compel the wife to pay the debt, upon the ground that the supplies were for her use, the contract to the contrary notwithstanding. This relief would absolve the contract debtor from liability, since the creditor cannot enforce payment twice for the same demand. The decree would be a nullification of the contract, not an enforce-

ment of it. In all the cases decided by this court in which the supplies were charged to the husband, and yet payment for them was enforced out of the wife's estate, it appeared that, notwithstanding the goods were charged against the husband, the credit was really given to the wife, and it also appeared that the supplies were actually used for the benefit of the wife's estate.

We do not mean to say that where the credit was given to the wife, though the charge was made against the husband, and where the latter in purchasing the supplies professed to act for and on behalf of the wife, that it is necessary to show that the supplies actually went to the wife's benefit, in order to hold her estate liable. In *Montgomery* v. *Everleigh*, 1 McCord Ch. R., 267, and *Cater* v. *Everleigh*, 4 Dessaus. Ch. R., 19, which were cited and relied on by this court in *Guion* v. *Dogherty*, 43 Miss. R., the right to recover against the wife's estate, when the credit was originally given to another, was put expressly upon the ground that the wife's estate had received the avails of the contract, and this, we think, is the true ground upon which to place it. But there is another ground equally fatal to the claim of the appellees. The bill charges that the goods sold were plantation supplies; the testimony of the appellee, when examined as a witness on his own behalf, is that they were both family and plantation supplies, and there is not the slightest particle of evidence to distinguish those which are for the use of the plantation from those for the use of the family. If it were competent at all to recover for family supplies under the allegations of the bill, there is a total failure to show the wife's consent for her husband to make the purchase on her credit. Without such proof there could be no recovery against her. The proof negatives both the consent of the wife that the husband should purchase family supplies on her credit, and the fact that he bought on her credit. Under the statute the wife cannot be charged with family supplies except she buy them herself on the credit of her estate, or the husband buy them with her consent on the like credit. The husband is primarily bound to furnish family supplies, and the wife can never be charged with them except by her consent. All the goods here were sold on the credit of the husband; and after that it was impossible to make the wife liable for such of them as were supplies only for her family, and not for her plantation. There